United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 22, 1976

TO : Emil C. Farkas, Regional Director
Region 9

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Lenox Trucking Inc.
Case No. 9-CA-9823

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This case was submitted for advice pursuant to Manual Section 11751.1(a) and presents the issue whether, under Quality Manufacturing and J. Weingarten[1] an employee is entitled to have a Union representative present when he is requested by the Employer to take a sobriety test.

FACTS

At approximately 1:00 a.m. the Charging Party was involved in a minor accident while driving the Employer's truck. The Employer immediately investigated the accident, and allegedly detected the odor of liquor on the Charging Party's breath. The Employer, pursuant to an applicable provision of the collective bargaining agreenient,[2] requested the Charging Party to submit to a sobriety test at the police station. The Charging Party requested Union representation at the sobriety test, and the Employer attempted to contact a representative of the Union by telephone; however, the Employer was not successful in its attempt. Thereafter, the Charging Party declined to take the test unless he was afforded union representation. He was then terminated.

The Employer contends that, pursuant to the contract, the Charging Party's refusal to take the test established a "presumption of being under such influence which consituted

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1 Quality Mfg. Co., 420 U.S. 256 (1975); NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975).

2 The contract reads in pertinent part:

> . . . However, no member shall be discharged or taken out of service by the Employer except for dishonesty; being under the influence of liquor which may be verified by a sobriety test (refusal to take a sobriety test shall establish a presumption of being under such influence). . .

ground *for* discharge." The Charging Party filed a grievance concerning the termination, which grievance reflected his assertion that he was terminated because he refused to take the sobriety test without union representation. The grievance was denied, without a written opinion, by the Joint Local Area Committee, a four member panel consisting of an equal number of Employer and Union representatives, the decisions of which are final and binding.

ACTION

It was concluded, for the following reasons, that the Section 8(a)(1) and (3) charge should be dismissed.

In the first place, it is not entirely clear that employees have a Section 7 right to union representation at a sobriety test.[3] Secondly, the evidence is extremely doubtful on the issue of whether the Employer discharged the employee for insisting on representation. Rather, it appears that the Employer proceeded without an "interview", determined that the employee was inebriated and discharged him therefor.[4] In this regard, it was noted that the Employer could and did rely upon the contract clause to create a presumption of drunkenness. Also, there was no independent evidence of Employer animosity toward the Union or toward employee exercise of Section 7 rights which would demonstrate that the discharge was unlawfully based on the demand for representation, rather than lawfully based on the Employer s independent evidence and the contractual presumption of drunkenness. Indeed, the evidence indicates that the Employer attempted to secure such Union representation as requested by the employee, but due in part to the 1ate hour such efforts were unavailing. By the nature of the sobriety test, time was of the essence.

Moreover, even assuming that a prima facie violation were established by the evidence adduced by the Region, the arbitral award upholding the discharge would appear to

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[3] It is assumed that the sobriety test at issue involved only a chemical analysis to determine drunkenness conducted by a neutral police officer, and that no interrogation by the Employer would have occurred. Moreover, the employee had willingly answered the Employer's questions concerning the incident, and did not seek Union representation for that "interview".

[4] Quality Mfg., 195 NLRB 197, 199.

warrant dismissal under Spielberg principles.[5] Thus, it cannot be said that the award is clearly repugnant under clear and well established principles of law. Further, under the Board's decision in Electronic Reproduction Service Corp., 213 NLRB No. 110, deferral to the arbitral panel's award would be warranted. Thus, although it is not clear from the ernployee's written grievance that the statutory, as opposed to the contract issue had been presented to the arbitral panel this would not, under E.R.S, supra, preclude deferral.[6] In this regard, it was noted that the award does not reflect a refusal to pass upon the statutory issue.

H.J.D.

[5] It was concluded that the Joint Local Area Counnittee, a bipartite committee, constitutes an arbitral panel for deferral purposes. See National Biscuit Co., 198 NLRB No. 4.

[6] Cf., Radioear Corp., 214 NLRB No. 33, and cf. Illinois Bell Telephone Co., 221 NLRB No. 159, at slip op. Note 7.